88-1954

Supreme Court, U.S.
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No. 88-

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

PATRICIA ANN STACHE,

Petitioner,

v.

International Union of Bricklayers
and Allied Craftsmen, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Contrary decisions in other Courts of Appeals notwithstanding, does Title VII necessarily require dismissal of an action against an international union not named in administrative sex-discrimination charges prepared by EEOC intake officers even in the face of District Court findings that (a) the lay complainant reasonably did not know to name the international, (b) there was substantial similarity of interest between the international and the international's local affiliate and a union/contractor joint apprenticeship committee who were named in the charges, (c) the international had timely notice of the charges before any EEOC fact-finding or conciliation efforts began and (d) the international was not prejudiced by not having been named?

2. Is the scope of a civil action under Title VII fixed as a matter of law, as the Court of Appeals below has held, by the wording of plaintiff's EEOC administrative charges or as a matter of fact, as other Courts of Appeals and as the District Court below have held, by the scope of the EEOC investigation that reasonably can be expected to grow out of those charges?

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LIST OF PARTIES

The parties to the proceedings below were petitioner Patricia Ann Stache and respondents International Union of Bricklayers and Allied Craftsmen, AFL-CIO, and Inland Empire Brickmasons Joint Apprenticeship Committee. The American Federation of Labor-Congress of Industrial Organizations was permitted to file a brief as amicus curiae.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit reversing the judgment entered by the District Court after 13 days of trial is reported at 852 F.2d 1231 and is reprinted as Appendix A. The Court of Appeals' unreported order denying petitioner's petition for rehearing with suggestions for rehearing en banc, Judge King having recommended that the Court of Appeals rehear the matter en banc, is reprinted as Appendix B. The District Court's unreported find-

ings of fact and conclusions of law are reprinted as Appendix C.[1]

JURISDICTION

The judgment of the Court of Appeals was dated and entered on August 1, 1988. Petitioner timely petitioned for rehearing with suggestions for rehearing en banc on August 15, 1988, which the Court of Appeals denied by an order entered on February 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 706(f)(1) of Title VII, 42 § U.S.C. 2000e-5(f)(1), provides:

> "If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent ... named in the charge ... If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if ... the Commission has not filed a civil action under this section or ... entered into a conciliation agreement ... the Commission ... shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved ...."

California Government Code § 12965(b) similarly provides:

[1]As used below, "ER" and "ER2d" refer to the Excerpts of Record filed in the Court of Appeals; "RT" refers to the Reporter's Transcript; "CT" refers to the Clerk's Transcript of docketed filings; and "Exh." refers to trial exhibits.

> "If an accusation is not issued within 150 days after the filing of a complaint, or if the department earlier determines that no accusation will issue, the department shall promptly notify, in writing, the person claiming to be aggrieved. Such notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization or employment agency named in the verified complaint within one year from the date of such notice. . . ."

STATEMENT OF THE CASE

In 1980 petitioner Patricia Ann Stache ("Stache") became the first (and at least through the time of trial in 1985 remained the only) woman member of respondent International Union of Bricklayers and Allied Craftsmen, AFL-CIO (the "International") in California's Riverside and San Bernardino Counties.[2] In the District Court,[3] Stache was awarded damages and injunctive relief based on proof of five years of pervasive sex discrimination (from the concealment

[2]Stache, her husband and her teenage son moved to California from their farm in Ohio in 1980. When her husband's California salary proved insufficient to support the family, she contacted the local unemployment office, which encouraged her to explore the possibility of working in the construction trades in light of her familiarity with outside work. As a result of pressure applied by state and federal officials (App. C, Findings 4-6), Stache was admitted to a bricklaying apprenticeship program that the International's constitution required each of its affiliates to establish (Exh. 110 at 9-10). Stache's skills proved to be as good as those of other apprentices and never prevented her from being employed (App. C, Finding 14). In signing up as an apprentice and joining the union, Stache wanted only to earn a living and had no interest in becoming a civil rights symbol or local *cause celebre*.

[3]Stache invoked the jurisdiction of the District Court under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*), 28 U.S.C. § 1331 and principles of pendent jurisdiction.

of available job opportunities to the intimidation of threats of gang rape and other physical abuse to the humiliation of urination on her bricklaying work in front of her and other apprentices and public statements that Stache would be hired only if she were good in bed and to actual and threatened retaliation for filing the action below).[4] It was no secret that this discrimination was occurring (11 RT 20), and most of the principal actors were Stache's fellow members of the International and its local affiliate ("Local 20").[5]

The District Court found that the International discriminated against Stache because it refused to make available to her its usual internal mechanisms for resolving grievances by members against other members or against affiliated

[4]In enacting the Equal Employment Opportunity Act of 1972, Congress said: "The time has come to bring an end to job discrimination once and for all, and to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one's abilities." H.R. Rep. No. 92-238, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News 2137, at 2141 (1972). What a hollow ring Congress' statement has 17 years later in the context of this case.

[5]Article I of the International's constitution (Exh. 110 at 3) defines the International as follows:

> "The International Union shall be composed of the Local Unions which created it, which have been chartered in the past, and which may be chartered in the future; the District Councils of affiliated Locals in various localities chartered in the past or which may be chartered in the future; and the State and Provincial Conferences of Locals in various States and Provinces which have been chartered in the past or may be chartered in the future, all hereafter collectively referred to in this Constitution as 'affiliates'."

Compare Glus v. G.C. Murphy Co., 562 F.2d 880, 888 (3d Cir. 1977) (discussed below) (International's constitution provided that membership "shall function through locals chartered by International's Executive Board").

locals for violations of the International's constitution.[6] The International admitted at trial that the *reason* that it withheld its grievance procedures from Stache, when it made them available as a matter of course in all other cases,[7] was *because* the International knew that Stache had filed a sex-discrimination charge with the EEOC:

> "Q [By the International's trial counsel]. Do you treat knowledge that a charge has been filed with the EEOC different than you would treat a complaint from a member of the International Union complaining [about] discrimination?
>
> "A [By the International's Vice President]. Yes, we do.
>
> "Q. Why is that?
>
> "A. Because that individual already has a complaint filed. They are likely to have counsel, and we think that it would be too dangerous in terms of interference or whatever if we handle it in a way where we're dealing with a member directly."

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[6]The International's constitution forbids sex discrimination and gives the International sweeping powers to discipline violators (App. C, Finding 39; 5 RT 105, 132-33; Exh. 110 at 12). The constitution is a binding contract between the International and its members. *See United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. v. Local 334*, 452 U.S. 615, 621 & n.8 (1981); *IAM v. Gonzales*, 356 U.S. 617, 618-19 (1958).

[7]When a member's grievance cannot be resolved informally, the International has procedures whereby the member can bring formal charges under the International's constitution (5 RT 103). The International's established policy, however, is to "treat as a formal charge under procedures established in the International Union's constitution any complaint that could not be satisfactorily resolved informally" (9 RT 44).

(5 RT 180-81.)[8] The District Court found that the International violated Title VII:[9]

> "The International had the power to stop the Local 20 from discrimination against Stache, but it took no remedial action. Contrary to its policy to treat as a formal charge under procedures established in the International's Constitution any complaint that could not be satisfactorily resolved informally, the International never treated Stache's unresolved allegations as formal charges. The only explanation offered by the International for the differential treatment of Stache was that it treats members who have filed charges of discrimination with the EEOC differently than other complaining members because it 'feels' that they already have legal counsel. The International has not articulated a legitimate, nondiscriminatory reason for this different treatment of Stache."

App. C, Finding 45.[10]

Stache filed her first charge with the EEOC on April 17, 1981, alleging sex discrimination in the apprenticeship program beginning in October 1980 (App. C, Finding 46).[11]

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[8]Stache was not herself represented by counsel in connection with any administrative charge or proceeding (App. C, Finding 48; 5 RT 51). The International's contrary presumption is at odds with experience. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982).

[9]The jury similarly found that the International violated the California Fair Employment & Housing Act. Cal. Gov't Code §§ 12900 *et seq.*

[10]*Compare Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665-69 (1987) (liability properly imposed under Title VII for discriminatory treatment of discrimination-based grievances). Like *Goodman*, this was not a case where Stache sought to hold the International vicariously liable for any discrimination but its own (3/10/86 RT 10).

[11]An EEOC intake officer drafted Stache's charge (4 RT 180).

Stache understood that she was filing her charge against "the bricklayers" and believed that that included everyone involved with her apprenticeship (5 RT 47-48).[12] The EEOC told Stache that the agency's representatives "would find out all the parties involved during their investigation stage" (5 RT 50).

Through no fault of Stache, the EEOC never conducted a reasonable investigation of her allegations of sex discrimination (App. C, Finding 48). After an initial fact-finding conference on Stache's first charge, an EEOC representative told her that he was going to investigate further (4 RT 47). Approximately four months later, Stache was informed that the EEOC had closed its investigation because of its mistaken belief that Stache had not responded to an inquiry from the agency. Stache immediately contacted the EEOC, explained the agency's error and requested that it reopen its investigation. Based on assurances from the EEOC, Stache reasonably believed that the EEOC had reopened her case and from February 1982 to August 1983 was continuing to investigate (App. C, Finding 46; Exhs. 102, 104).[13]

In July 1982, Stache wrote a letter to the President of the International explaining her situation and asking for the International's help. Despite its established practice of treat-

[12]At the time that she filed her first charge, Stache could not have named the International because she did not know that the International or the joint apprenticeship committee that was composed of three representatives of the local and three representatives of area contractors (the "JAC") had a separate legal existence (4 RT 181-82). See footnote 5 above. The District Court found that Stache reasonably did not know to name the International in her charge (App. C, Finding 47).

[13]The EEOC told Stache that the investigation stage "could take six months or a year or even longer, because the EEOC was quite backed up on investigations of charges" (4 RT 47).

ing such letters as formal complaints, the International never responded (App. C, Finding 41).[14]

In August 1983, Stache learned for the first time that the EEOC's investigation of her charge had not been reopened and was not pending. The EEOC's Deputy Director told her that the EEOC had make a mistake (5 RT 29) and advised her that, since the discrimination was continuing, she should file a new charge that would continue her first charge (App. C, Finding 47; 5 RT 31-33).[15]

When Stache visited the EEOC in September 1983 to file her second charge, still without benefit of legal counsel (5 RT 37), the EEOC intake officer on duty asked her whether there had been any further acts of discrimination since she filed her first charge but told her that the agency would add only the most obvious new facts to her first charge to get it going again (5 RT 36-37). The intake officer said that the EEOC "would investigate the charge and it would all come out in the investigation" (5 RT 36-37).

In December 1983, the EEOC held a fact-finding conference on Stache's second charge but cut it short because no progress was being made on conciliation and Stache requested her notice of right to sue (App. C, Finding 48). As a result, a reasonable investigation of her second charge never occurred (App. C, Finding 48).

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[14]Representatives of the International testified that they had no record of having received Stache's letter, and there was substantial controversy at trial as to whether it was "correctly addressed" to the International's headquarters (for the past 60 years) at the "Bowen Building, Washington, D.C." (4 RT 130; Exh. 544), even though the United States Postal Service recognizes that address in its directories (Exhs. 606, 609; 5 RT 119, 129-30).

[15]The District Court found that, because discrimination was continuing at all times, both of Stache's EEOC charges were timely (App. C, Finding 47).

Stache was not represented by an attorney at any time before March 1984 (when she filed the action below), and the District Court found that she reasonably did not know to include the International in either of her EEOC charges (App. C, Finding 48; 5 RT 51). A reasonable investigation by the EEOC of Stache's first charge would have disclosed that before the first fact-finding conference the International knew of the charge from discussions about it with Local 20's business manager and did not exercise its powers to take action (App. C, Finding 48). A reasonable investigation by the EEOC of Stache's second charge also would have included the International (App. C, Finding 48).[16]

The District Court found that the International suffered no prejudice by not having been named in either of Stache's charges (App. C, Finding 48). The International could have participated in the conciliation or fact-finding processes if it felt that Local 20 would not adequately represent its interests. Before the first fact-finding conference, the International knew that Stache had filed charges of sex discrimination against its local affiliate (App. C, Finding 48) and advised its local's business agent to appear at the conference and present his case (App. C, Finding 40; 7 RT 200).[17] The International also knew that Stache had filed a *second* charge of discrimination several months before the fact-finding conference on *that* charge. At all times, including at trial, the International vigorously attempted to defend Local 20's and the JAC's treatment of Stache and throughout denied that any discrimination had occurred.

[16]The trial court found that all of Stache's claims in the lawsuit were part of a pattern of continuing sex discrimination reasonably related to her charges (App. C, Finding 50).

[17]As the District Court observed in denying the International's motion for summary judgment, the International also obviously knew that the sex discrimination alleged by Stache would violate the rights that the International guaranteed to members in its constitution (ER2d 114 at 9).

In March 1984 (within 90 days of receiving her right-to-sue letter from the EEOC), Stache commenced the action below. The International and its counsel were "the ringleaders . . . in leading the defense" (5/19/86 RT 19-20) and, without a hint of a desire to conciliate, litigated as if every issue were the critical determinant in some sort of crucial test case.

In April 1985, the International moved for summary judgment on a variety of grounds, including its arguments based on Stache's failure to name it in her EEOC charges. The District Court denied the motion, ruling that even if the International was not named, it knew about Stache's charges and was not prejudiced (ER2d 114 at 9). In June 1985, the International moved for reconsideration of the denial of its motion for summary judgment.[18] The District Court denied the motion.

After 13 days of trial in September and October 1985, the District Court awarded damages and injunctive relief against the International under Title VII, having found as a fact that a reasonable investigation of Stache's charges by

[18]In its motion for reconsideration, the International argued that the District Court could not consider the fact that the International learned about Stache's charges in part from computer printouts that it had received from the EEOC. It based its argument on EEOC Compliance Manual § 3.8, which provides that international unions "participating in the processing of charges under this section will not be named as respondents solely for involving themselves, after the fact, in a charge or complaint against affiliated local unions in order to determine the underlying facts or to seek voluntary resolution of the charge or complaint" (ER2d 114 at 4-5). This provision is a sort of "Good Samaritan Rule" designed to protect internationals that (in marked contrast to the International here) actually do try to help; it was not designed to require courts to close their eyes to evidence that internationals knew about charges and were not prejudiced by not having been named therein. In any event, the International here had knowledge of Stache's charges from sources other than just the printouts (App. C, Finding 44).

the EEOC would have included the International (App. C, Finding 48).[19] The District Court also held that Stache reasonably did not know to name the International in her administrative charges (App. C, Finding 48) and that the International knew about Stache's charges before the EEOC held its first fact-finding conference and was not prejudiced by not having been named (App. C, Finding 48).

On August 1, 1988, the Court of Appeals reversed and directed the District Court to vacate its judgment against the International and to enter an order dismissing Stache's complaint against the International. Without expressly considering whether the District Court's findings were "clearly erroneous" under Fed. R. Civ. P. 52(a) or whether the District Court's instructions to the jury were wrong, the Court of Appeals held, *ipse dixit*, that Stache's administrative

[19] In connection with Stache's pendent claim under the California Fair Employment & Housing Act ("FEHA"), the District Court instructed the jury as follows (14 RT 77):

> "If you find that Mrs. Stache filed charges with the DFEH or EEOC and failed to name a particular defendant as a discriminating party, then in order to find that defendant liable, you must find that a reasonable investigation of her charges would have included claims against that defendant."

Having returned a verdict against the International, the jury thus necessarily must have concluded that a reasonable agency investigation of Stache's charges would have included her claims against the International. The Court of Appeals swept aside the verdict with its erroneous holding that the failure to name the International, while not "jurisdictional" under federal law because of this Court's holding in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), is "jurisdictional" under California law. Other than that the California Supreme Court has not yet addressed the "jurisdictional" issue resolved by this Court in *Zipes*, there was no legal basis for drawing this distinction. *See generally California Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), and *DFEH v. Paramedicus*, FEHC Dec. No. 80-4, at 7-9 (1980) (ER2d 172, Tab E), both holding that the FEHA provides greater protection against sex discrimination than does Title VII.

charges were insufficient as a matter of law to allow her to pursue any claim against the International (App. A at 9316):

> "Stache's Title VII complaint charged that the International failed to aid her when it learned of Local 20's actions. But her EEOC claims were limited to charging Local 20 with specific, active acts of discrimination. The International's alleged inaction is not so closely related to Local 20's active discrimination as to render a second EEOC investigation redundant. *See Brown*, 732 F.2d at 730. And the International had no direct contractual relationship with Stache's employer from which Title VII liability could be imputed. *Compare Kaplan* , 525 F.2d at 1359. Even construing Stache's EEOC claims liberally, her charges do not encompass the International. . . .
>
> "If a complainant neither names a defendant in her administrative charges, nor alleges facts implying that the defendant discriminated, a Title VII action against such defendant is premature at best. . . ."

On August 15, 1988, Stache timely petitioned for rehearing with suggestions for rehearing en banc. Stache asked the Court of Appeals to rehear whether the findings below that a reasonable investigation by the EEOC would have included the International satisfied even the "redundancy" test applied by the Court of Appeals and whether under the *Glus* test adopted in other circuits the action should be remanded to the District Court to consider whether it was unnecessary to name the International.[20] One of the three judges on the panel of the Court of Appeals that heard Stache's appeal recommended that the matter be reheard en banc, but a majority of the court failed to vote in favor. The Court of Appeals therefore denied the petition on February 27, 1989 (App. B).

[20]Stache had relied in part on *Glus* in defeating the International's motion for summary judgment (CT 72 at 15-17) and in proposing jury instructions (CT 143 at 17a; CT 170 at 20a).

REASONS FOR GRANTING THE WRIT

In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the Court held that failure to name a discriminating party in a charge filed with the EEOC is not necessarily a jurisdictional bar to prosecuting a Title VII civil action against that party. This petition asks the Court to resolve conflicts among the circuits as to the proper analysis of when Title VII actions may be tried on their merits against parties not named in EEOC charges.

Reversing the judgment entered in the District Court, the Ninth Circuit's decision here creates a direct conflict with decisions in other circuits by changing the focus of the analysis and sharply narrowing the circumstances in which Title VII actions may proceed to trial on the merits. Since the EEOC cannot be counted on to instruct victims of discrimination (who like Stache usually are unrepresented and untutored in the law) how to avoid the procedural pitfalls that may deprive them of the remedies to which their claims entitle them, the decision below, if allowed to stand, closes the courthouse door before Stache and other victims of discrimination can be heard and makes private enforcement of the civil rights laws more tortuous.[21] And, in marked contrast to contrary decisions in other circuits, the decision below applies the naming requirement blindly without regard to the District Court's findings that showed that, even though Stache did not name the International in her charges, the underlying congressional policies of giving notice and pro-

[21]The EEOC's administrative foul-ups recently have been the subject of Congressional inquiries and substantial adverse publicity. Stache and other claimants like her should not be penalized under Title VII or the FEHA for an agency's mistakes. *See, e.g., Watson v. Gulf & W. Indus.*, 650 F.2d 990, 992 (9th Cir. 1981); *DFEH v. Cairo*, FEHC Dec. No. 84-04, at 9-11 (1984) (ER2d 172, Tab F).

moting conciliation and voluntary compliance were adequately served.[22]

I.

THE NINTH CIRCUIT'S REFUSAL TO REMAND THE CASE TO THE DISTRICT COURT TO CONSIDER THE NAMING REQUIREMENT IN LIGHT OF (A) STACHE'S INABILITY TO APPRECIATE THE LEGAL SEPARATENESS OF THE INTERNATIONAL AND ITS LOCAL AFFILIATE THAT SHE NAMED IN HER CHARGES, (B) THE SUBSTANTIAL SIMILARITY OF INTEREST BETWEEN THE NAMED AND UNNAMED PARTIES AND (C) THE ABSENCE OF PREJUDICE TO THE INTERNATIONAL IS IN DIRECT CONFLICT WITH HOLDINGS OF THE THIRD AND OTHER CIRCUITS APPLYING THE *GLUS* TEST

In *Glus v. G.C. Murphy Co.*, 562 F.2d 880 (3d Cir. 1977), the Court of Appeals for the Third Circuit held that where a Title VII plaintiff has failed to name her international union in an EEOC charge that names her local union, the district

[22]The tests followed in other circuits properly balance these policies against the equally-strong policy of affording "complete redress of legitimate grievances without undue encumbrance by procedural requirements especially when demanding full technical compliance would have no relation to the purposes for requiring those procedures in the first instance." *Glus v. G.C. Murphy Co.*, 562 F.2d 880, 888 (3d Cir. 1977). *Accord Eggleston v. Chicago Journeymen Plumbers' Local 130*, 657 F.2d 890, 907 (7th Cir. 1981), *cert. denied* , 455 U.S. 1017 (1982). *See generally Turner v. Orr*, 804 F.2d 1223, 1227 (11th Cir. 1986), quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460-61 (5th Cir. 1970) (discussed below):

> " 'Mindful of the remedial and humanitarian underpinnings of Title VII and of the crucial role played by the private litigant in the statutory scheme, courts consistently have been extremely reluctant to allow procedural technicalities to bar claims brought under the Act. Consequently, courts confronted with procedural ambiguities . . . have, with virtual unanimity, resolved them in favor of the complaining party.' "

court must determine whether the action nevertheless may proceed against the international in light of the following factors:

> "1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party."

562 F.2d at 888. By refusing to adopt and apply this test below, the Ninth Circuit has put itself in direct conflict with the Third Circuit's decision in *Glus* and with decisions of the Sixth, Seventh, Eighth and Tenth Circuits adopting and applying *Glus.*[23]

The *Glus* court arrived at this test by striking a reasonable balance between the competing policies at stake (562 F.2d at 888 (emphasis added; footnotes deleted)):

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[23]6th Cir.: *Romain v. Kurek*, 836 F.2d 241, 245-46 (6th Cir. 1987); 7th Cir.: *Eggleston v. Chicago Journeymen Plumbers' Local 130*, 657 F.2d 890, 904-08 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); 8th Cir.: *Greenwood v. Ross*, 778 F.2d 448, 451 (8th Cir. 1985) (citing *Eggleston*); 10th Cir.: *Romero v. Union Pac. R.R.*, 615 F.2d 1303, 1311-12 (10th Cir. 1980). District courts in other circuits also have adopted the *Glus* test. *E.g.*, 1st Cir.: *Denny v. Westfield State College*, 25 Fair Empl. Prac. Cases 957, 961-62 (D. Mass. 1981); 2d Cir.: *Lobos v. Aeromexico, IAM Dist. 146*, 18 Empl. Prac. Dec. ¶ 8886, at 5662-64 (S.D.N.Y. 1978); 4th Cir.: *EEOC v. Charleston Elec. Joint Apprenticeship Training Comm.*, 587 F. Supp. 528, 529-31 (S.D. W. Va. 1984); 5th Cir.: *Mathews v. Houston Independent School Dist.*, 595 F. Supp. 445, 446-48 (S.D. Tex. 1984); 11th Cir.: *Wong v. Calvin*, 87 F.R.D. 145, 147-50 (N.D. Fla. 1980); *Williams v. Southern Bell Tel. & Tel. Co.*, 464 F. Supp. 367, 370-71 (S.D. Fla. 1979).

"The purpose of requiring an aggrieved party to resort first to the EEOC is two-fold: to give notice to the charged party and provide an avenue for voluntary compliance without resort to litigation. [Citations omitted.]

"... [M]uch of the initiation of charges with the EEOC is done by laymen, as was true in the instant case. *We cannot believe Congress intended that a person filing charges should accurately ascertain, at the risk of later facing dismissal of their suit, at the time the charges were made, every separate entity which in some way may have violated Title VII.*

"In the instant case, Glus in her complaint to the EEOC charged her employer and her local union with sex discrimination. Whether she could foresee at that stage in the proceedings the necessity and desirability of adding the International we cannot say. *It would seem reasonable from the standpoint of the complainant that if voluntary compliance could not be obtained through the EEOC from her employer or her local union the addition of the International would make little, if any difference* . . . Consideration of these factors [*i.e.*, the four factors quoted at p. 15 above] should be initially in the hands of the district court. The goal of conciliation without resort to the already overburdened federal courts is of great importance and should not be lost. However, equally important is the availability of complete redress of legitimate grievances without undue encumbrances by procedural requirements especially when demanding full and technical compliance would have no relation to the purposes for requiring those procedures in the first instance."[24]

[24]The balance tips the same way here. Stache sought help from the International, got no response and had no reason to believe (even had she been able to appreciate that the International was a distinct legal entity) that the conciliation process would have been any less futile if the International had participated directly. And, while it is difficult sometimes for experienced lawyers and judges to think like non-lawyers, surely we do not have to stretch our imagination too far to see that a layman reasonably might not appreciate that a local union is an entity legally distinct from the

(footnote continued on next page)

The Seventh Circuit Court of Appeals followed similar reasoning in *Eggleston v. Chicago Journeymen Plumbers' Local 130*, 657 F.2d 890, 907 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982) (emphasis added; footnote omitted):

> "[I]f a party has a close relationship with a named respondent, as does the JAC, and has actual notice of the EEOC charge, as it is likely the JAC has had, to the extent that the JAC could have participated in conciliation efforts, the JAC 'should not be heard to cry "foul" when later made a defendant in a suit. . . .' *Stevenson v. International Paper Co., supra* , 432 F. Supp. at 397-98.
>
> "We question, in addition, the futility of presenting the JAC with more of an opportunity to conciliate than was presented herein. The Local 130 itself was unwilling to reach settlement with Rose or any other plaintiff and has fought their lawsuit with unmatched ferocity. *It would seem reasonable from Rose's standpoint that if voluntary compliance was not obtainable through the EEOC from Local 130, the addition of the JAC to the conciliation effort would have made little if any difference.* This conclusion is supported by the fact that the JAC did not settle the claims against it after Rose filed his later EEOC charge, specifically naming the JAC.

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international with which it is affiliated. Indeed, as quoted in footnote 5 above, the International in its own constitution defines itself as being composed of the locals that created it and the locals that it subsequently chartered (Exh. 110 at 3). As the District Court found, "Stache reasonably did not know to name the International expressly in either charge" (App. C, Finding 48). This case is not like cases relied on by the International below where courts found that reasonable investigations of administrative charges solely against employers would not also have included unions. It is (and should be) less difficult to establish as a factual matter that a reasonable investigation of union discrimination would include both a local and an international union. At least, Stache was entitled to pursue the opportunity to try this inherently-factual issue and to have the resulting findings accorded appropriate respect on appeal.

. . . .

> "Our reference to the oft-cited factors employed by the Third Circuit [in *Glus*] and other courts in making this determination compels the same conclusion."

Knowing that Stache had filed a charge of sex discrimination with the EEOC, the International affirmatively chose not to participate in the proceedings and not to contact Stache to hear her grievances as it would have done with other union members as a matter of course. Even with the protection afforded by the EEOC's Good Samaritan Rule, the International withheld its customary procedures simply because it knew that Stache was pursuing her Title VII rights before the EEOC.[25] The International elected to rely on its local affiliate to attend the administrative hearings and deal with Stache. As in *Eggleston*, the International here should not be heard to "cry 'foul.' "[26]

This case might be different if the International had *ever* tried to conciliate or if its position at trial had been that it was all a misunderstanding that the International would have tried to correct if it had been named in Stache's charges. Rather, from beginning to end, the International,

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[25]In signing her EEOC charge, how was Stache to know not only that the International was an entity legally separate from the local and the JAC but also that it would treat her differently than it treated other members because it knew that she had gone to the EEOC?

[26]The decision below inevitably would have the unintended and obviously deleterious effect of affirmatively discouraging parties not named in administrative charges from participating in conciliation efforts when they know that administrative proceedings are pending and can foresee that reasonable EEOC investigations likely will include them. Here, for example, it is supremely ironic that, as a result of the decision below, the International is substantively liable for having intentionally discriminated against Stache *because* it knew that she had filed a charge with the EEOC but nevertheless is procedurally insulated from liability because Stache did not name the International in that same charge. This cannot be what Congress had in mind for enforcement of Title VII.

the local and the JAC presented a united front in a litigation that they conducted with great ferocity, contesting every possible issue (often repeatedly), challenging Stache's credibility and arguing that even if the jury and District Court believed her testimony, the union (local and International) did not do anything wrong. As the District Court found, it was the International (not any of the other parties) and its counsel who were the "ring leaders ... in leading the defense in this case" (5/19/86 RT 19-20).

II.

EITHER THE NINTH CIRCUIT'S DECISION FOCUSING ON THE WORDING OF STACHE'S EEOC CHARGES RATHER THAN ON THE SCOPE OF THE INVESTIGATION THAT REASONABLY COULD BE EXPECTED TO GROW OUT OF THEM CONFLICTS IN PRINCIPLE WITH THE FIFTH AND OTHER CIRCUITS' HOLDINGS APPLYING THE *SANCHEZ* TEST OR IT CONFLICTS WITH THE RULE THAT DISTRICT COURT FINDINGS SHALL NOT BE SET ASIDE ON APPEAL UNLESS "CLEARLY ERRONEOUS"

In *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970), the Court of Appeals for the Fifth Circuit established the rule that the scope of a Title VII civil action is limited not by the wording of an administrative charge but rather by the scope of the EEOC investigation that reasonably can be expected to grow out of that charge. It reasoned as follows (431 F.2d at 466) (emphasis in original):

> "[T]he 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.
>
> "The logic of this rule is inherent in the statutory scheme of Title VII. A charge of discrimination is *not*

> filed as a preliminary to a lawsuit. On the contrary, the purpose of a charge of discrimination is to trigger the investigatory and conciliatory procedures of the EEOC. Once a charge has been filed, the Commission carries out its investigatory function and attempts to obtain voluntary compliance with the law. Only if the EEOC *fails* to achieve voluntary compliance will the matter ever become the subject of court action. Thus it is obvious that the civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation. Within this statutory scheme, it is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination."

The Fifth Circuit rule has been adopted and applied in other circuits.[27]

The Ninth Circuit, however, appears to follow a test that would allow a Title VII complaint to be tried on its merits only if it is "'like or reasonably related to the *allegations* of the EEOC charge.'" App. A at 9315 (emphasis added), quoting *Brown v. Puget Sound Electrical Apprenticeship & Training Trust*, 732 F.2d 726, 729 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985), and *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973). This test conflicts in principle with the *Sanchez* test because it focuses on the allegations in an EEOC charge rather than on the *investigation* that can reasonably be expected to grow out of those allegations.

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[27] *E.g.*, 3d Cir.: *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 398-99 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); 4th Cir.: *Chisholm v. United States Postal Service*, 665 F.2d 482, 491 (4th Cir. 1981); 6th Cir.: *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1363 (6th Cir. 1975), *cert. denied*, 423 U.S. 994 (1976); 8th Cir.: *Johnson v. Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 846 n.11 (8th Cir.), *cert. denied*, 434 U.S. 920 (1977); 11th Cir.: *Turner v. Orr*, 804 F.2d 1223, 1226 (11th Cir. 1986).

Relying again on its prior decision in *Brown*, the Ninth Circuit then posits a rule that a Title VII complaint and an administrative charge are not closely enough related if "a second administrative investigation would be redundant." App. A at 9315. Under this formulation, the finder of fact apparently would be asked to compare *two* investigations, neither of which will ever actually have occurred, to determine whether the second would be "redundant" of the first.[28] The result is an unnecessarily confusing metaphysical exercise in which the finder of fact tries to compare two hypothetical investigations. Surely, it is simpler and better, as the Fifth Circuit directed in *Sanchez*, for the finder of fact to examine the evidence at trial to determine the *reasonable* scope of a *single* investigation and thus appropriately to balance the policy of affording all of the relief that the merits of a claim justify against the policy of providing notice and promoting informal conciliation and voluntary compliance. The Ninth Circuit test muddles the factual analysis and fails to take proper account of the policies at stake.

Whether the Ninth Circuit test conflicts in principle with the *Sanchez* test or not, the decision below conflicts with the rule that findings of fact are not to be set aside on appeal unless they are "clearly erroneous." Fed. R. Civ. P. 52(a). *See Hamm v. Members of Board of Regents*, 708 F.2d 647, 650 (11th Cir. 1983) (finding that reasonable EEOC investigation would not have included individual defendant named in complaint, while "not entirely free from doubt," upheld as not "clearly erroneous").

Here, the Court of Appeals did not even mention that the District Court found as a fact that a reasonable investiga-

[28]Here, if a *reasonable* EEOC investigation would have encompassed Stache's claims against the International (as the jury and the District Court both found), then a "second investigation" *would* have been redundant.

tion of Stache's charges would have included the International (App. C, Finding 48) and that all of Stache's claims were part of a pattern of continuing sex discrimination reasonably related to her EEOC charges (App. C, Finding 50).[29] The Court of Appeals also made no mention of the "clearly erroneous" test.[30] All it said was: "The International's alleged inaction is not so closely related to Local 20's active discrimination as to render a second EEOC investigation redundant." App. A at 9316. The Court of Appeals' *ipse dixit* not only flies in the face of the District Court's findings of fact, but it is at best counter-intuitive since the underlying injuries that Stache complained of against all defendants were not only "closely related" but exactly the same. In any event, setting aside the District Court's factual findings *sub silentio* and substituting its own interpretation of the facts conflicts with one of the most basic tenets of limited appellate review.

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[29]The Ninth Circuit did note without discussion (App. A at 9314) that the District Court had instructed the jury that it could not hold the International liable unless it first found that a reasonable investigation of Stache's charges would have included her claims against the International.

[30]The Ninth Circuit did not discuss what standard of review it purported to apply.

CONCLUSION

For the reasons set forth above, this petition should be granted.

Respectfully submitted,

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May 16, 1989

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA ANN STACHE,
Plaintiff-Appellant,

v.

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, AFL-CIO; INLAND EMPIRE BRICKMASON JOINT APPRENTICESHIP COMMITTEE,
Defendants-Appellees,

No. 86-6551

D.C. No.
CV-84-2022-WJR

PATRICIA A. STACHE,
Plaintiff-Appellee,

v.

BRICKLAYERS AND TILE SETTERS UNION, LOCAL #20; INLAND EMPIRE BRICKMASON JOINT APPRENTICESHIP COMMITTEE; MASONRY BUILDERS, INC.,
Defendants,

and

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, AFL-CIO,
Defendant-Appellant.

No. 86-6576

D.C. No.
CV-84-2022-WJR

OPINION

Appeals from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted
December 8, 1987—Pasadena, California

Filed August 1, 1988

Before: Diarmuid F. O'Scannlain and Edward Leavy, Circuit Judges, and Samuel P. King,* District Judge.

Opinion by Judge O'Scannlain

SUMMARY

Employment Discrimination/Courts and Procedure/Labor

The court reversed and remanded a judgment in this sex discrimination action against an international union for the actions of its local affiliate and held that if a complainant neither names a defendant in her administrative charges, nor alleges facts implying that the defendant discriminated, a Title VII action against such defendant is premature.

Appellee Bricklayers and Craftsmen International Union directs its local affiliates to establish apprenticeship committees. Gender discrimination is prohibited. Appellant Patricia Stache enrolled in the apprenticeship program and throughout her apprenticeship was repeatedly sexually harassed. Stache sought help four times from the EEOC and the California Department of Fair Employment and Housing (DFEH). The International learned of Stache's dispute with Local 20 through EEOC computer printouts. However, the International did not participate in the EEOC or DFEH fact-finding conferences held pursuant to Stache's complaints. Stache named the International for the first time in a com-

*The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

plaint against it in federal court claiming violations of the California Fair Employment and Housing Act (FEHA) and Title VII. The International raised the affirmative defense that Stache's failure to name it in her administrative complaints barred her from pursuing her Title VII and FEHA actions. A jury found that all defendants had violated the FEHA. The judge found that all defendants violated Title VII.

[1] If, when an employee brings suit for incidents not listed in his prior EEOC charge, the two claims are not so closely related that a second administrative investigation would be redundant, the EEOC must be allowed to investigate the dispute before the employee may bring a Title VII suit. [2] The International's alleged inaction is not so closely related to Local 20's active discrimination as to render a second EEOC investigation redundant. And the International had no direct contractual relationship with Stache's employer from which Title VII liability could be imputed. [3] If a complainant neither names a defendant in her administrative charges, nor alleges facts implying that the defendant discriminated, a Title VII action against such defendant is premature at best.

COUNSEL

Joann Lach and William T. Bissett, Hughes, Hubbard & Reed, Los Angeles, California, for the plaintiff-appellant/cross-appellee.

Marsha S. Berzon, Altshuler & Berzon, San Francisco, California, for the defendant-appellee/cross-appellant.

Robert M. Weinberg, Washington, D.C., for amicus curiae American Federation of Labor-Congress of Industrial Organizations.

OPINION

O'SCANNLAIN, Circuit Judge:

We review the interplay between state and federal administrative conciliation procedures on the one hand, and judicial remedies on the other, in this sex discrimination action against an international union for the actions of its local affiliate. The international argues that the complainant's failure to name it in her administrative actions against the local rendered her subsequent suit against the international procedurally defective. We agree and reverse the decision of the district court with respect to the international.

BACKGROUND

1. *Relationship Between the Parties*

The International Union of Bricklayers and Allied Craftsmen, AFL-CIO ("International") represents 103,000 workers throughout the United States and Canada. The International directs its local affiliates to establish apprenticeship committees; these committees regulate local apprenticeship matters "except as otherwise provided in [the International's] constitution", but must conform to national standards proscribing gender discrimination.

Bricklayers and Tile Setters Local Union 20 of California ("Local 20") is a local affiliate of the International. Local 20 has its own constitution, signs its own collective bargaining agreements, and calls its own strikes. Members of Local 20 pay dues to both Local 20 and the International.

The Inland Empire Brick Masons Joint Apprenticeship Committee ("JAC") conducts apprenticeship training programs for Local 20 members. The International takes no part in the establishment, funding, administration, or supervision of the JAC.

2. *Stache's Claim*

In 1980 Patricia Ann Stache became the first woman to enroll in the apprenticeship program. Throughout her apprenticeship, Stache was repeatedly intimidated, humiliated, and sexually harassed by JAC teachers, Local 20 officials, and fellow workers. The record indicates that Local 20 concealed employment information from Stache, gave male apprentices more job referrals, and took no action upon learning that employers refused to hire Stache because of her gender.

Stache sought help four times from the Equal Employment Opportunity Commission ("EEOC") and the California Department of Fair Employment and Housing ("DFEH"). Her first EEOC complaint named "Bricklayer Local No. 20," and charged that Local 20 (1) had not referred her to work; (2) denied her a union card and a wage increase; and (3) told her not to attend an orientation class. Stache's second EEOC complaint named "Bricklayers, Masons, and Tile Setters Local No. 20." It alleged that (1) "the Union has refused to give me a rule book"; and (2) "the Union has failed to refer me to jobs on the same basis as it refers the male apprentices." Stache's third complaint, filed with the DFEH, named the JAC and alleged discrimination in job referrals. Stache also filed a complaint against her employer.

The International learned of Stache's dispute with Local 20 through EEOC computer printouts and conversations with Local 20 officials. However, the International did not participate in the EEOC or DFEH factfinding conferences held pursuant to Stache's complaints.

Stache named the International for the first time in a complaint against it, Local 20, and the JAC in federal court, claiming violations of the California Fair Employment and Housing Act, Cal. Gov. Code §§ 12900 *et seq.* (1980) ("FEHA"), and Title VII of the Civil Rights Act of 1964, 42

U.S.C. §§ 2000e *et seq.* (1978) ("Title VII"). In its answer, the International raised the affirmative defense that Stache's failure to name it in her administrative complaints barred her from pursuing her Title VII and FEHA actions.

At trial, the district court instructed the jury that:

> If you find that Mrs. Stache filed charges with the DFEH or EEOC and failed to name a particular defendant as a discriminating party, then in order to find that defendant liable, you must find that a reasonable investigation of her charges would have included claims against that defendant.

The jury found that all defendants had violated the FEHA and awarded Stache compensatory and punitive damages. The judge found that all defendants violated Title VII. He granted Stache an injunction against future discrimination by defendants, compensation for lost pay, attorney fees apportioned among the International, Local 20, and the JAC in proportion to damages, and costs. Stache appeals the apportionment of attorney fees and urges that the total award should be paid exclusively by the International. The International cross-appeals, urging lack of jurisdiction among other issues. Local 20, presently undergoing bankruptcy proceedings, has not appealed. The JAC has not appealed. The AFL-CIO filed an amicus brief in support of the International.

DISCUSSION

We deal first with the International's cross-appeal on the jurisdictional issue. To encourage informal conciliation and voluntary compliance with its precepts, Title VII places primary responsibility for employment discrimination cases with the EEOC. *Brown v. Puget Sound Elec. App. & Train. Trust,* 732 F.2d 726, 729 (9th Cir. 1984), *cert. denied,* 469 U.S. 1108 (1985). A private plaintiff must first file an EEOC complaint against the allegedly discriminatory party before

bringing a Title VII suit in federal court. 42 U.S.C. § 2000e-5 (1978). However, a plaintiff's failure to file an EEOC complaint does not bar her absolutely from filing a Title VII suit; exhaustion of administrative remedies is not jurisdictional but is merely a condition precedent to suit which a defendant may waive or be estopped from asserting. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *Boyd v. United States Postal Serv.*, 752 F.2d 410, 414 (9th Cir. 1985); Fed. R. Civ. P. 9(c).

Under California law, exhaustion of state administrative remedies remains a jurisdictional prerequisite to a FEHA action. *Carter v. Smith Food King*, 765 F.2d 916, 921 (9th Cir. 1985); *Robinson v. DFEH*, 239 Cal. Rptr. 908, 909 (Cal. App. 1987) ("Judicial review is unavailable until all administrative remedies have been exhausted, and a court violating the rule acts in excess of jurisdiction").

The remedial purpose of Title VII and the paucity of legal training among those whom it is designed to protect require charges filed before the EEOC to be construed liberally. *Kaplan v. International Alliance of Theatrical Employees*, 525 F.2d 1354, 1359 (9th Cir. 1975); *Wrighten v. Metropolitan Hosp., Inc.*, 726 F.2d 1346, 1352 (9th Cir. 1984). This standard also applies to FEHA charges filed before the California DFEH. *Carter*, 765 F.2d at 924 n.10 (citing *Stearns v. Fair Employment Practice Comm'n*, 6 Cal. 3d 205, 214, 98 Cal. Rptr. 467, 472 (1971)).

[1] When an employee brings suit for incidents not listed in his prior EEOC charge, a federal court may hear the new Title VII claims if they are "like or reasonably related to the allegations of the EEOC charge." *Brown*, 732 F.2d at 729 (quoting *Oubichon v. Northern Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973)). But if the two claims are not so closely related that a second administrative investigation would be redundant, the EEOC must be allowed to investigate the dispute before the employee may bring a Title VII suit. *Brown*,

732 F.2d at 730. *See also Stallcop v. Kaiser Found. Hosp.*, 820 F.2d 1044, 1051 (9th Cir.)(applying same principle to DFEH complaints), *cert. denied*, 108 S. Ct. 504 (1987).

[2] Stache's Title VII complaint charged that the International failed to aid her when it learned of Local 20's actions.[1] But her EEOC claims were limited to charging Local 20 with specific, active acts of discrimination. The International's alleged inaction is not so closely related to Local 20's active discrimination as to render a second EEOC investigation redundant. *See Brown*, 732 F.2d at 730. And the International had no direct contractual relationship with Stache's employer from which Title VII liability could be imputed. *Compare Kaplan*, 525 F.2d at 1359. Even construing Stache's EEOC claims liberally, her charges do not encompass the International. In any event, there was no triggering mechanism by which the International was compelled to act.[2]

[3] If a complainant neither names a defendant in her administrative charges, nor alleges facts implying that the defendant discriminated, a Title VII action against such defendant is premature at best. *Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658, 666 (9th Cir. 1980). *See also Kaplan*, 525

[1]We decline to reach the issue of whether this conduct, by itself, violated Title VII.

[2]Stache also mailed a letter to the International complaining of Local 20's conduct and requesting assistance, but the International denied receiving it. Under both federal and California law, the correct addressing, posting, and mailing of a letter creates a presumption that the letter was received by the intended party. *In re Carter*, 511 F.2d 1203, 1204 (9th Cir. 1975); J. Wigmore & P. Tillers, Wigmore on Evidence § 95 n.4. However, because Stache's letter did not include any street address, no such presumption of receipt arises. *See Wagner Tractor, Inc. v. Shields*, 381 F.2d 441, 446 (9th Cir. 1967); *Leason v. Rosart*, 811 F.2d 1322, 1325 (9th Cir. 1987) (when receipt of improperly addressed letter is denied, trier of fact must weigh the denial against the inference of receipt arising from proof of mailing). Therefore, as a matter of law, the district court's instruction to the jury that the International was presumed to know of the Local's acts from Stache's letter is erroneous.

F.2d at 1359 (when EEOC complaint charged sex discrimination in a referral agreement negotiated by the international, failure to name it in an EEOC charge against the local did not bar Title VII suit against the international).

In its answer to Stache's complaint, the International timely asserted Stache's noncompliance with the conditions precedent to Title VII claims. *See* Fed. R. Civ. P. 9(c). *Compare Gibson*, 543 F.2d at 1263 n.1 (international waived condition precedent when it waited until second trial to assert procedural claim).

We conclude that Stache failed to meet the conditions precedent to a Title VII suit, and the International has not waived them. Nevertheless, we remain mindful of the public policy favoring liberal construction of EEOC and DFEH complaints. However, imputing Stache's administrative complaints against Local 20 to the International would offend the underlying purpose of Title VII — to encourage informal conciliation and to foster voluntary compliance. *See Brown*, 732 F.2d at 729. And, of course, failure to name the International in the DFEH complaint was a jurisdictional bar to a FEHA claim. *See Carter*, 765 F.2d at 921. We therefore reverse the judgment of the district court against the International and remand with instructions to dismiss the complaint against it.

Review of the other issues raised by the International on appeal is unnecessary because of our disposition of the jurisdiction issue.

ATTORNEY FEES

Stache's appeal claims that the district court abused its discretion in apportioning the award of legal fees among the defendants in relation to the damages assessed by the jury. Because we hold her Title VII action against the International procedurally defective, we must also vacate that portion of

the district court's award of attorney fees to Stache which was payable by the International, as to which defendant she is no longer a prevailing party. *See* 42 U.S.C. § 2000e-5(k); *United States v. Washington*, 813 F.2d 1020, 1024 (9th Cir. 1987). We remand to the trial court the matter of whether the allocations against Local 20 and JAC should be reconsidered in light of this opinion.

REVERSED and REMANDED.

United States Court of Appeals
FOR THE NINTH CIRCUIT

PATRICIA ANN STACHE,
Plaintiff-Appellant,
v.
INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, AFL-CIO; INLAND EMPIRE BRICKMASON JOINT APPRENTICESHIP COMMITTEE,
Defendants-Appellees,

No. 86-6551
DC No. CV-84-2022-WJR

FILED
FEB 27 1989
Cathy A. Catterson, Clerk
U.S. Court of Appeals

PATRICIA A. STACHE,
Plaintiff-Appellee,
v.
BRICKLAYERS AND TILE SETTERS UNION, LOCAL #20; INLAND EMPIRE BRICKMASON JOINT APPRENTICESHIP COMMITTEE; MASONRY BUILDERS, INC.,
Defendants,
and
INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, AFL-CIO,
Defendant-Appellant.

No. 86-6576
DC No. CV-84-2022-WJR

ORDER

Before: O'SCANNLAIN and LEAVY, Circuit Judges, and KING,* District Judge

* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

The panel has voted to deny the petition for rehearing. Judges O'Scannlain and Leavy have voted to reject the suggestion for rehearing en banc, and Judge King has so recommended.

An active judge of the court requested an en banc vote. Having failed to receive a majority of the votes in favor of en banc consideration, the petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

United States District Court
Central District of California

PATRICIA ANN STACHE, *Plaintiff,* *v.* **BRICKLAYERS AND TITLE SETTERS LOCAL UNION 20 OF CALIFORNIA, INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, AFL-CIO; INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, AFL-CIO; INLAND EMPIRE BRICKMASONS JOINT APPRENTICESHIP COMMITTEE,** *Defendants.*	**CV84-2022-WJR** **ENTERED** **JAN 13 1986** **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After trial by the Court of plaintiff's claim for sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"), the Court makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Findings of Fact

1. Defendant International Union of Bricklayers and Allied Craftsmen Local 20, California ("Local 20"),* is a labor organization affiliated with Defendant International Union of Bricklayers and Allied Craftsmen, AFL-CIO ("the Inter-

*Local 20 is sued herein under the name Bricklayers and Tile Setters Local Union 20 of California, International Union of Bricklayers and Allied Craftsmen, AFL-CIO.

national") and chartered by it to operate in San Bernardino and Riverside Counties. Defendant Inland Empire Brickmasons Joint Apprenticeship Committee ("the JAC") is a joint management-labor committee, half of whose members are members and officers of Local 20. The remaining JAC members are representatives of employers who are signatories to Local 20's collective bargaining agreement.

2. At all relevant times, Local 20 and the JAC have administered an apprenticeship program for bricklayers in San Bernardino and Riverside Counties ("the apprenticeship program"). The JAC's duties include overseeing the apprenticeship teachers and facilities, investigating the training provided to apprentices and taking appropriate action. As stated in their apprenticeship standards filed with the State of California, it is Local 20's and the JAC's function, duty and responsibility to see that continuous employment is provided, insofar as possible, to all apprentices.

3. Emanuel J. Puglisi ("Puglisi") was Local 20's Business Agent and a JAC member in 1980 and 1981 and has been Local 20's Business Manager from the beginning of 1982 to the present. Louis McAteer ("McAteer") has been Local 20's Business Agent and the JAC's Secretary from the beginning of 1982 to the present. One of the duties of Local 20's Business Agent is to be aware of all job opportunities for Local 20's members and to try to match up members with jobs. Local 20's Business Agent and Business Manager also are responsible for policing the collective bargaining agreement which, among other things, prohibits discrimination on the basis of sex.

4. In 1980, the State of California began compliance efforts to enforce requirements that apprenticeship programs, such as Local 20's and the JAC's, admit women. At the time, Local 20 and the JAC had no women in their apprenticeship program.

5. Also in 1980, the Southern California Area Construction Opportunity Program ("SCACOP"), a federally-funded program whose mandate was to get more women and minorities into the construction trades, requested that Local 20 and the JAC admit the plaintiff, Patricia Ann Stache ("Stache"), into their program.

6. In response, Local 20 and the JAC accepted Stache into their apprenticeship program and she was to begin attending bricklaying classes in September 1980 starting with the first class of the semester, an orientation class. A day or so later, Local 20 and the JAC requested that Stache not come to the September orientation class because "it's just for the boys" and start instead at the next class, thereby missing the orientation. At the orientation class, apprentices are told about the assistance that Local 20 can provide them in getting employment and, specifically, the employment list from which Local 20 makes job referrals. Puglisi specifically directed his secretary not to send notice of the orientation class to Stache.

7. On October 4, 1980, Stache arrived at the apprenticeship classroom with a SCACOP representative, and met Puglisi, who was introduced as Local 20's Business Agent, and the teacher, Dick Michalides ("Michalides"). In fact, Local 20 controlled the labor representatives of the JAC directly and controlled the employer representatiaves indirectly through its power to enforce the collective bargaining agreement. Puglisi and Michalides gave Stache a blank form entitled "Apprenticeship Agreement" and asked her to sign it, which she did. A month or so later, Stache received a copy of the Apprenticeship Agreement signed by Puglisi and a representative of the Division of Apprenticeship Standards of the California Department of Industrial Relations ("DAS"), which as required by law, approved and filed the Apprenticeship Agreement. The Apprenticeship Agreement recited that Stache had become an apprentice on October 4,

1980, would complete her training in approximately three years and that the JAC and Puglisi would "use their best endeavors to secure [Stache] employment and training." As an apprentice, Stache was required, in accordance with the terms of the Apprenticeship Agreement, to perform satisfactorily all work and learning assignments.

8. The Apprenticeship Agreement also recited that Stache was employed by Ford Masonry Inc. In fact, Stache was not then and had never been employed by Ford Masonry, and neither Local 20 nor the JAC ever referred her there. Puglisi admitted on cross-examination that he lied to Mrs. Stache and to the State of California about her being employed by Ford Masonry. When Stache questioned Michalides, he told her that the listing of Ford Masonry in the Apprenticeship Agreement was "just union business."

9. Stache is the only person who has ever been indentured into Local 20's and the JAC's apprenticeship program without a job. All other apprentices were actually employed by the employers listed by the JAC on their apprenticeship agreements when they were filed with the State.

10. Stache regularly attended apprenticeship class and quickly learned that she was the only apprentice who was unemployed. Stache asked Michalides and Puglisi how and when she would get a job. They repeatedly told her that they would get her a job when they thought she was ready and that she was not to try to get a job on her own by contacting employers directly. Another apprentice, Curtis Thibodeaux, heard Puglisi tell Stache, "don't find work. We'll find it for you." Not until May 1981 at a conference with the Equal Employment Opportunity Commission ("EEOC") seven months after Stache had been admitted into the apprenticeship program, did Puglisi tell that Stache that she could contact employers directly for work.

11. At all relevant times, Puglisi and McAteer knew that contractors on publicly-funded (state, federal and local gov-

ernment) projects were required to hire a certain percentage of women and minorities. Puglisi also knew in late November or early December 1980 that bricklayers would be needed at the site of a new state agricultural building, and he informed Stache that she would be going to work soon and should purchase bricklaying tools costing over $200. In reliance on Puglisi's representations, Stache used her husband's Christmas bonus to pay for bricklaying tools.

12. The bricklaying job promised by Puglisi never materialized. In March 1980, after prodding from Stache and a call from Ann Quick ("Quick"), a recruiter for SCACOP, Stache and Puglisi visited the site of the state building under construction to ask Fireside Construction Company, a signatory to the collective bargaining agreement, to hire Stache. Puglisi spoke with the foreman of Fireside outside of Stache's hearing, and when Fireside did not hire Stache, Puglisi explained to Stache privately that "contractors don't like to hire women because they will leave work when their kids get sick." Despite his stated belief that Fireside was refusing to hire Stache because of her sex and his knowledge that Fireside was required by law to hire a woman at this publicly-funded site, Puglisi took no action to obtain this job for Stache.

13. By the end of April 1981, when Stache filed her first charge of discrimination with the EEOC, Stache had been going to bricklaying class for almost seven months but had never been employed or referred to a job. When Stache regularly asked Puglisi about work, he told her that there were no jobs available. Neither Puglisi nor Michalides ever told Stache about Local 20's weekly employment list, from which Local 20 referred unemployed bricklayers to work.

14. At all relevant times, with the exception of a 12-week period in 1982 when she was recovering from minor surgery, Stache had been physically able and capable of doing appren-

tice bricklayer's work. Her skills and classroom attendance were as good as those of other apprentices and never prevented her from being employed.

15. Within two weeks after Stache filed her first EEOC charge, she started work as an apprentice bricklayer. It was principally through the efforts of SCACOP, not Local 20 or the JAC, that Stache obtained her first job.

16. Puglisi knew that Stache wanted to be a union member from the time that he first met her. When she asked before starting her first job why she did not have something to prove she was in the union, Puglisi replied that he would not give her a union card because Stache would not stay in the program and if he took her dues money, he could not return it. Stache protested that she was not going to drop out, but she still got no union card. While working on her first job, the foreman told Stache she could not continue working without a union book. When Stache explained the situation to Puglisi and again asked him for a union card, he told her that he would give her one when he was ready.

17. Local 20 did not accept dues from Stache until one month after she began work and then only because the EEOC intervened. Local 20's collective bargaining agreement requried, as a condition of employment, the tendering of union dues within seven days after work begins and Puglisi never refused union membership to a man who had been working as a bricklayer more than seven days. In addition, Local 20 continued to deny Stache a copy of the union's by-laws and constitution and collective bargaining agreement provided to all members upon request despite Stache's repeated requests for the documents during the next two years.

18. At the EEOC fact-finding conference at the end of May 1981, Puglisi told the EEOC investigator that local con-

tractors did not want to hire women bricklayers. The EEOC investigator told Puglisi that the union should help Stache file charges of discrimination against any employer that refused to employ her, and Puglisi promised Stache and the EEOC to do this.

19. At the EEOC conference, Puglisi admitted that Stache's Apprenticeship Agreement misrepresented that Stache was employed. He promised Stache and the EEOC to do his best to see that Stache was employed and completed her apprenticeship, and Puglisi and McAteer repeated this promise to Stache many times over the following years.

20. Despite these promises, Local 20 and the JAC discriminated against Stache in access to job opportunities. As Puglisi told the EEOC in May 1981, Local 20 refers members to jobs from a list of those unemployed who sign up weekly. When a contractor calls for employees, they are dispatched from the top of the list, unless members are requested by name. Although Stache signed up on the employment list, Local 20 refused to refer her to jobs for which she was qualified. In September 1981, when Stache was listed on the employment list, Local 20 referred out male apprentices who were below her on the list or not on the list at all to a job at Kaiser Steel. Stache repeatedly telephoned Puglisi to question why everyone but she was working at the site and to request the union referral necessary to gain access to the site. Only after three weeks passed and all available male apprentices had been referred did Local 20 refer Stache to the jobsite.

21. Local 20's and the JAC's refusal to refer Stache to jobs continued from 1982 through 1984. For over five continuous months in 1982, Stache was the apprentice at the top of Local 20's employment list but received no job referrals. Stache also received no referrals for the entire 12-month period from May 1983 until May 1984 despite the fact that

she was always on Local 20's employment list and for six of those months was the top-listed apprentice.

22. In addition to refusing to refer Stache to jobs on an equal basis with male apprentices, Local 20 and the JAC denied Stache information regarding where others were working so that she could approach employers directly for a job. Local 20's and the JAC's practice is to tell male members of Local 20 what jobs are in progress even if the union has received no requests for bricklayers. McAteer also kept his own list of ongoing bricklaying jobs which he would show to any male member who asked about jobs. Before Stache filed this action, Puglisi and McAteer never suggested an employer for her to contact or show her any list of possible jobs. They consistently told her that there was no work and that they had done everything they could to help her.

23. Local 20 and the JAC have admitted that two employers, Dave Wilshire and the Piccoli Brothers, refused to consider Stache for employment because of her sex. Despite their promise to the EEOC, Local 20 and the JAC did not assist Stache in filing charges of discrimination against these employers and did not inform Stache of the facts so that she could complain to the EEOC.

24. The foreman of another employer, Masonry Builders, Inc., told Stache and McAteer that Stache was hired and would be called to work by Masonry Builders. When Stache learned that the bricklaying work was being completed without her, contrary to the foreman's promises, she appealed to McAteer for assistance. McAteer told Stache that "the vice-president of Masonry Builders said he's not having any goddam women on his job site, that women were nothing but trouble." McAteer knew it was a violation of the collective bargaining agreement for an employer to refuse to employ Stache because of her sex, but he told Stache that he could do nothing about Masonry Builder's refusal to call her to work.

25. The statistics confirm that without Local 20's and the JAC's job referrals and assistance in finding jobsites given to male apprentices and without Local 20's and the JAC's help in opposing employers' discrimination, Stache lost job opportunities. Male apprentices worked an average of six times more hours than Stache worked during 1982 (adjusted for the period of Stache's unavailability as a result of surgery), an average of two-and-one-half times more hours than she worked during 1983 and an average of twice as many hours as she worked during 1984. Throughout the last five years, Stache has consistently ranked low among apprentices in hours worked, and the likelihood that her hours would be so low randomly, without the influence of an external force such as discrimination, is one in 1,000. Out of the last five years, Stache has been unemployed at least three full years (October 1980 to May 1981, all of 1982, May 1983 to May 1984, September to December 1984) as well as smaller periods of weeks and months between jobs. No male apprentice has been unemployed a full year, let alone three such years. Had she not been discriminated against, Stache would have worked at least as many hours as the average male apprentice and most likely would have worked substantially more because of the preference accorded women on publicly-funded jobs.

26. On more than one occasion, Stache specifically asked Puglisi and McAteer if she was required to be hired on publicly-funded jobs, and both denied this despite their admitted knowledge of this fact. McAteer specifically knew that women were required to be hired on state and local government public works jobs, and though he received lists of such jobs from the Department of Apprenticeship Standards, he never advised Stache of the list or any job on the list.

27. In addition to being denied work, Stache was the target of abuse and intimidation at work and in class because of her sex. Officials of Local 20 and the JAC singled

out Stache and stressed to her in a manner never done to men the "horrors" of bricklaying work, telling her that she would break her back, cut off her hands, fall off scaffolding or become a hunchback doing bricklaying work. On one job site, McAteer told Stache she had to be careful around the guys because she could be raped.

28. At the Kaiser Steel jobsite, Michalides, Stache's apprenticeship teacher, repeatedly gathered at breaks with other apprentice and journeymen bricklayers at the tunnel where Stache was emerging and threatened to rape her. On at least one occasion, Michalides repeatedly screamed "screw you" to Stache. Michalides testified that, because of his authority as an apprenticeship teacher, the apprentice bricklayers at the Kaiser Steel jobsite would have listened to him. However, instead of stopping the harassment, Michalides participated in and encouraged it, with the result that Stache's work environment became intimidating, hostile and offensive. When Stache told Puglisi and McAteer about this incident at a fact-finding conference before the EEOC on her second charge of discrimination, they laughed.

28. The Chairman of the JAC, Stephen Winegardner, a local masonry contractor who had work for apprentices, repeatedly responded to requests to hire Stache by saying that he would hire her only "if he was ten years younger and she was good in bed." Stache repeated Winegardner's comment to Puglisi, Local 20's attorney and her apprenticeship teacher at an apprenticeship class, but Winegardner's refusal to hire on the basis of sex was never investigated by anyone at Local 20 or the JAC. When, after the filing of this lawsuit, Winegardner finally agreed to hire Stache on a publicly-funded job, McAteer told Stache that Winegardner did so reluctantly and would "make her life a living hell."

29. Throughout the five years of her apprenticeship, officials of Local 20 and the JAC stated to Stache and others that women are not physically able to do bricklaying work

(despite the lack of any physical requirements for admission into the apprenticeship program, stated or othewise), that women belonged at home and that employers would not hire women.

30. In early 1984, after Stache had indicated her intention to sue Local 20 and the JAC, a male apprentice urinated on Stache's bricklaying work during class in front of her, her apprenticeship teacher and her classmates, yelling, at one point, "Women don't belong in the union because they can't take the shit." The apprenticeship teacher failed to discipline the male apprentice so as to prevent the incident from recurring, and when the full JAC later considered the incident, it decided not to discipline the apprentice or request an apology. Stache asked an official of Local 20 and the JAC to file a grievance against the offending apprentice. The response was that there was "no reason to file a grievance. We're not going to do anything."

31. Stache began to fear for her physical safety in the apprenticeship program. Though she had told only Puglisi and McAteer of her intention to bring this lawsuit, other bricklayers learned of her intent to sue, presumably from Local 20 and JAC officials, and reacted angrily. One apprentice threatened her, asking first "Are you the broad suing the Union?" and then telling her "you know the Union has a contract out on you." Stache was concerned enough to raise this matter with her teacher, who laughed it off and took no action, although he knew that Stache took the matter seriously. On another occasion, McAteer told Stache that all the contractors in California knew of this case and that she would never work again. He also said that everyone in the union knew about Stache's lawsuit and that she should be careful on the jobsite. McAteer also told the apprenticeship class that Local 20 and the JAC could not afford materials for the class because Stache was suing the union, turning

the other apprentices against Stache and causing at least one to demand that she drop her lawsuit.

32. Based on a 1970 census of women in the workforce, the State of California set 18.3% women as the goal for the JAC to achieve in its apprenticeship program. Despite at least seven written applications of women seeking entry into Local 20's and the JAC's apprenticeship program since 1980 and the admission of over 35 new apprentices during that time, Stache has remained the only woman apprentice in the apprenticeship program. From 1980 until after the filing of this lawsuit, Stache has remained the only woman member of Local 20, which has had between 500–700 members.

33. Local 20 has articulated no legitimate, nondiscriminatory reason for its differential treatment of Stache in admission to the union.

34. Local 20 and the JAC have articulated no legitimate nondiscriminatory explanation for their differential treatment of Stache in admission to the apprenticeship program.

35. Local 20 and the JAC have articulated no legitimate nondiscriminatory reason for their failure to refer Stache to jobs on an equal basis with male apprentices and to advise her of possible job opportunities. The evidence indicates that Local 20 and the JAC attempted to conceal from Stache the avenues available to her to obtain work. While Local 20 and the JAC contend that no work in fact existed, the employment of male apprentices belies this. Regardless of whether males were employed as a result of union referrals, Local 20's and the JAC's knowledge of where other apprentices were employed was never communicated to Stache. Because of her sex, Local 20 and the JAC concealed from Stache information about publicly-funded jobs on which they knew she was required to be hired. Local 20 and JAC officials told Stache that if she wanted to be a bricklayer, she could not

accept part-time work in any other field and would be dropped from the apprenticeship program if she did.

36. Local 20 and the JAC have articulated no legitimate, nondiscriminatory reason for the sexual harassment of Stache by the JAC Chairman and her apprenticeship teacher. In addition, Local 20 and the JAC failed to remedy known harassment and threats against Stache made by their officers and supervisors and by other apprentices made because of her sex or in retaliation for this lawsuit. This harassment, along with statements of discriminatory or retaliatory intent by agents and officers of Local 20 and the JAC and the absence of any other woman in the apprenticeship program during the last five years, establish that any reason stated by Local 20 and the JAC for their actions is a pretext for discrimination.

37. From 1980 to the present, on the basis of sex, Local 20 and the JAC have continuously treated Stache differently from male apprentices and have denied her benefits to which she was entitled. This occurred as part of a policy, pattern and practice designed to force her to drop out of their apprenticeship program.

38. Stache is a member of the International, and the International receives a portion of the dues money she pays to Local 20.

39. The International's Constitution mandates that all affiliated local unions must conform to the Constitution and to the National Apprenticeship and Training Standards for Bricklaying subscribed to by the International. Both the International's Constitution and the National Apprenticeship Standards prohibit discrimination on the basis of sex by an affiliated local union, and the International can remove the officers and revoke the charter of a local union which knowingly violates this prohibition.

40. The International learned about Stache's first charge of sex discrimination shortly after it was filed in April 1981. Prior to the EEOC's fact-finding conference on May 28, 1981, Puglisi mentioned the charge to Erich Paarsch ("Paarsch"), a Vice President of the International. Paarsch advised Puglisi to appear at the EEOC fact-finding conference and to present his case, which Puglisi did. The International later received a computer printout, dated June 30, 1981, reporting that Stache had filed with the EEOC a charge of sex discrimination naming Local 20.

41. Stache wrote to the International in July 1982 explaining the facts of her situation and asking for the International's help in stopping discrimination against her. The letter was addressed and mailed to the International at the Bowen Building, wherein International had its headquarters. The letter was never returned to plaintiff. This gives rise to an inference that International had notice of the contents of the letter. The International did not follow its general practice and policy to respond to a specific complaint of discrimination received from a member of a local union by investigating that complaint, and it did not treat the letter as a formal charge under procedures established in the International's Constitution.

42. In 1983, the International received a second computer printout, dated September 30, 1983, reporting Stache's second charge of sex discrimination filed September 27, 1983.

43. In January 1984, Francis M. Bachofer, a Vice President of the International, was told by Puglisi that Stache was going to commence a lawsuit, which she in fact did two months later.

44. Even without considering its receipt of the computer printouts, the International knew or should have known that Local 20 was discriminating against Stache on the basis of sex.

45. The International had the power to stop the Local 20 from discrimination against Stache, but it took no remedial action. Contrary to its policy to treat as a formal charge under procedures established in the International's Constitution any complaint that could not be satisfactorily resolved informally, the International never treated Stache's unresolved allegations as formal charges. The only explanation offered by the International for the differential treatment of Stache was that it treats members who have filed charges of discrimination with the EEOC differently than other complaining members because it "feels" that they already have legal counsel. The International has not articulated a legitimate, nondiscriminatory reason for this different treatment of Stache.

46. Stache filed her first charge of discrimination with the EEOC on April 17, 1981, alleging sex discrimination in the apprenticeship program beginning in October 1980. Shortly after conducting the fact-finding conference on her first charge, the EEOC wrote to Stache asking her to contact the agency. She immediately spoke with the EEOC investigator by telephone and did not hear anything further from the agency until approximately four months later, in October 1981, when she received a notice of right to sue on her first charge. The notice indicated that the EEOC was closing its investigation solely because Stache had failed to respond to the notice sent more than 30 days earlier. Since she had never failed to respond to an EEOC notice, Stache contacted the EEOC and explained that she had responded telephonically to the notice. At that time, she requested that the investigation be reopened. Based on assurances from the EEOC that the investigation would be reopened, Stache reasonably believed that the EEOC had withdrawn the notice of right-to-sue, had reopened Stache's case, and from February 1982 to August 1983 was investigating the charge. Stache's failure to sue within 90 days of receiving the right-

to-sue notice on her first charge was reasonable given the assurances of the EEOC.

47. In August 1983, when Stache learned for the first time that the EEOC's investigation of her first charge had not been reopened and was not pending, she filed a second charge of discrimination. In doing so, Stache reasonably relied on the EEOC's advice to file a charge of continuing discrimination seeking relief for all the discrimination she claimed to have suffered and to be continuing to suffer. Because discrimination was continuing at all times, both of Stache's EEOC charges were timely. Stache received her notice of right to sue on her second charge sometime after December 29, 1983, and timely filed this lawsuit within 90 days.

48. The International was adequately named in Stache's first and second charges. Stache was not represented by an attorney at any time before 1984, and she reasonably did not know to name the International expressly in either charge. The International suffered no prejudice because it knew of the first EEOC charge expressly naming its affiliated local before the first fact-finding conference. Reasonable investigation by the EEOC of Stache's first charge (which did not occur through no fault of Stache) would have disclosed that Paarsch knew of Stache's charge from oral discussions with Puglisi and that the International did not exercise its powers to take action. A reasonable investigation of Stache's second charge (which did not occur because Stache requested her notice of right to sue) would have included the International.

49. The JAC was adequately named in Stache's first and second charges because representatives of the JAC actually participated in the corresponding fact-finding conferences and a reasonable investigation by the EEOC of the allegations of discrimination in the apprenticeship program would have included the JAC.

50. All of Stache's claims are part of a pattern of continuing sex discrimination reasonably related to her charges. Stache's sexual harassment claims are not sufficiently different from her EEOC charges as to preclude suit. Stache apprised the EEOC of her harassment claims when her second charge was filed and investigated, thereby doing everything necessary to bring them within the scope of the administrative process.

51. The fact that Stache is a woman or had asserted her Title VII rights was a factor that made a difference in each of defendants' acts and omissions in controversy. As a direct and proximate result of defendants' discrimination, Stache has suffered financial losses, which include lost wages (including wage increases and overtime) and contributions for her pension and medical insurance. Some of these lost wages, including future wages, should be calculated at journeyman's rates because, but for defendants' discrimination, she would have been earning wages at those rates.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over each defendant as a labor organization or a joint labor-management committee within the meaning of Title VII and over all claims asserted by Stache. 42 U.S.C. §§ 2000e(d), 2000e-2(d), 2000e-5(e).

2. As more fully described herein, Stache has established a prima facie case of sex discrimination against all defendants. Defendants have failed to articulate a legitimate, nondiscriminatory reason for their different treatment of her. To the extent that defendants have articulated reasons for their actions or failures to act, Stache has established that those reasons are mere pretexts for sex discrimination.

3. In violation of Title VII, Local 20 and the JAC discriminated against Stache on the basis of sex in admission to

their apprenticeship program and in providing employment opportunities. 42 U.S.C. § 2000e-2(d).

4. In violation of Title VII, Local 20 excluded Stache from membership because of her sex. 42 U.S.C. § 2000e-2(c)(1).

5. In violation of Title VII, Local 20 failed and refused to refer Stache for employment in a way which deprived her of employment opportunities on the basis of sex. 42 U.S.C. § 2000e-2(d).

6. In violation of Title VII, Local 20 acquiesced in employers' discrimination against Stache by refusing to take available action against employers which Local 20 actually knew had refused to hire Stache because of her sex. *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1304 (9th Cir. 1982); *Romero v. Union Pacific R.R.*, 615 F.2d 1303, 1310-11 (10th Cir. 1980).

7. In violation of Title VII, Local 20 and the JAC retaliated against Stache because she opposed practices prohibited by Title VII. 42 U.S.C. § 2000e-3(a).

8. Under Title VII, Local 20 and the JAC are liable under the doctrine of respondeat superior for the sexual harassment of Stache by their agents and supervisors. *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979). In addition, Local 20 and the JAC knew or should have known of this harassment and harassment by other apprentices but failed to take any corrective action, thereby subjecting Stache to an intimidating, hostile and offensive work environment.

9. In violation of Title VII, the International discriminated against Stache on the basis of sex because it knew or should have known of the discrimination against Stache by Local 20 and, despite the power to do so, failed to act. *Kaplan v. International Alliance of Theatrical & Stage Employees*, 525 F.2d 1354, 1359-60 (9th Cir. 1975).

10. In violation of Title VII, the International discriminated against Stache because of her sex and because she opposed practices prohibited by Title VII. 42 U.S.C. §§ 2000e-2(c)(1), 2000e-3(a).

11. Stache is entitled to injunctive relief against defendants prohibiting discrimination against her in the future.

12. The 90-day period within which to file suit on Stache's first EEOC charge was equitably tolled for purposes of computing back pay.

13. Because defendants' violations of Title VII are of a continuing nature, Stache is entitled to back pay from October 1980 to the present and to front pay (the present value of lost earnings reasonably certain to occur between the date of trial and the date when Stache becomes a journeyman bricklayer) for wages lost as a result of defendants' discrimination, in the total amount of $90,518.00, to be paid in the amount of $45,259.00 by the Local 20, $27,157.00 by the JAC, and $18,102.00 by the International. This award shall be concurrent with the jury's award which also included back pay and front pay. Plaintiff is not entitled to recover twice for the same damages.

14. As the prevailing party, Stache is entitled to reasonable attorneys' fees and costs.

DATED: January 9, 1986.

/s/ William J. Rea

WILLIAM J. REA
United States District Judge

Supreme Court, U.S.
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JUL 19 1989
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CLERK

No. 88-1954

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PATRICIA ANN STACHE,
Petitioner,
v.
INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an international union that was not named in plaintiff's EEOC charges may be sued under Title VII of the 1964 Civil Rights Act for failing to remedy discriminatory conduct by a separate autonomous local union affiliated with the international union, where:

(1) the international union was not involved in any of the local's discriminatory conduct;

(2) no policies established by the international union were at issue;

(3) the facts on which the international's liability is based were not mentioned or alluded to in the EEOC charges; and

(4) the international union was never apprised prior to the filing of the lawsuit that its own liability was at issue.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1954

PATRICIA ANN STACHE,
Petitioner,

v.

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioner's statement of the opinions below incorrectly asserts that one of the three judges on the Ninth Circuit panel hearing the case favored a rehearing en banc. (Pet. 1.) In fact, none of those judges supported en banc review. The two circuit judges on the panel voted against the suggestion of an en banc hearing, and Judge King (who, as a district judge, could not vote on the matter) "so recommended"—that is, recommended against a rehearing en banc. (Pet. App. B-2.)

STATEMENT OF THE CASE

Petitioner claims that respondent International Union of Bricklayers and Allied Craftsmen (the "International") should be liable under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, for failing to remedy discriminatory acts by one of the 570 autonomous local unions affiliated with the International against one of its 103,000 individual members, despite the undisputed fact that the International had no involvement whatever in local's discriminatory conduct and was not named, or alluded to, in four separate discrimination charges that petitioner filed with the EEOC or its cooperating state agencies.

1. After trial, petitioner was found to have been discriminated against on the basis of sex by Bricklayers and Tile Setters Local Union 20 of California ("Local 20" or "the Local") and by a joint union-management apprenticeship committee (the "JAC") that was organized and run in part by Local 20. It is undisputed that the International and Local 20 are separate and distinct legal entities,[1] that no officers or employees of Local 20 are or have been officers or employees of the International, and that the International had no involvement in any of the Local's day to day activities, such as negotiation and enforcement of the Local's collective bargaining agreements, election of local officers and hiring of its business agents, or management of the Local's internal affairs. It is also undisputed that the International played no part in the

[1] The courts have long held "that a local union is a legal entity apart from its international and that it is not a mere branch or arm of the latter." *International Brotherhood of Electrical Workers*, 121 NLRB 143, 146 & n.3 (1958) (citing numerous cases). *See Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979); *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922). The Bricklayers International Constitution (Trial Exhibit 110) specifically guarantees local union autonomy and further provides that none of the International's affiliated locals has authority to act on behalf of the International without express authorization.

operation or management of the JAC. (5 RT 96-97; 12 RT 133-35.)

After trial the International Union was also held liable; that liability, however, was based on facts separate and distinct from the acts of intimidation and harassment set forth on page 4 of the petition, upon which the liability of Local 20 and the JAC was based. As petitioner states, "[t]he District Court found that the International discriminated against Stache because it refused to make available to her its usual mechanisms for resolving grievances by members against other members or against affiliated locals for violations of the International's constitution." (Pet. 4-5.) The evidence underlying this finding related to four occasions in which the International allegedly "learned or should have learned" of discrimination against petitioner by the Local. (Pet. App. C-17, 21.)

(a) The first such occasion involved a telephone conversation between one of Local 20's assistant business agents and an International field representative, during which the local official mentioned, in the most general terms, that he had been asked to attend an EEOC conciliation conference concerning a discrimination charge. There was no reference during the conversation to the nature of the charge, the fact that it concerned an allegation of sex discrimination, or the name of the individual claiming discrimination.

(b) Two of the other instances in which the International was informed of alleged discrimination by the Local were the result of a voluntary agreement that the International had entered into with the EEOC. Under that agreement, the International was regularly sent a computer list of EEOC charges pending against bricklayer locals throughout the country as a means of aiding in its voluntary efforts to conciliate discrimination disputes between its locals and individual members.[2] On

[2] In 1980 the EEOC adopted a procedure whereby international unions could voluntarily receive notification of EEOC charges

both of these occasions, following its receipt of the printouts listing petitioner's EEOC charge against Local 20, the International promptly sent a letter to the Local inquiring about the charges. In both instances, the International received replies from Local 20 that reasonably led the International to believe that no action on its part to aid in conciliation was warranted.[3]

(c) At the trial, the principal factual issue concerning the International involved its failure to institute disciplinary proceedings against Local 20 in response to a letter petitioner claimed to have sent to the International in 1982 complaining about the Local's failure to refer her to jobs. The purported letter, however, was, according to petitioner's evidence, incorrectly addressed, lacking a street name, number and zip code, and petitioner was unable at trial to present any evidence that the letter was

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pending against their affiliated locals. That procedure is set forth in Section 3 of the EEOC's Compliance Manual, promulgated pursuant to 42 U.S.C. § 2000e-12(a). Section 3.8(a) of the Manual provides:

> National or International unions participating in the processing of charges . . . will not be named as respondents solely for involving themselves, after the fact, in a charge or complaint against affiliated local unions in order to determine the underlying facts or to seek a voluntary resolution of the charge or complaint.

The Bricklayers International Union has voluntarily participated in this program since its inception. In furtherance of its voluntary efforts to aid in the resolution of complaints, the International tracks all known complaints of discrimination resulting from the EEOC printouts.

[3] The Local responded to the International's inquiry regarding the first EEOC charge by stating that the "charges have been dropped at this time" (Exhibit 113), a statement that the Local believed to be true, since the EEOC did in fact close the file in the case. The Local's response to the second inquiry from the International accurately stated that petitioner was about to file a lawsuit. (9 RT 74.)

in fact mailed. (4 RT 131-33.)[4] The International denied ever having received such a letter.

In a portion of its ruling not challenged in the petition, the Ninth Circuit held that the district court improperly applied the rules of evidence in admitting the letter into evidence, and that, without the letter, there was no triggering mechanism by which the International was compelled to act. (Pet. App. A-8 and n.2.)

On the basis only of these four sparse and problematic contacts, and with no evidence whatever linking the International's own actions or inactions to petitioner's sex, the district court held that the International discriminated against the petitioner on the basis of sex in the manner in which the International handled the information it received concerning her dispute with the Local. (Pet. App. C-17, 21.)[5]

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[4] The petition falsely states that "[t]he International admitted at trial that the reason that it withheld its grievance procedures from Stache . . . was because the International knew that Stache had filed a sex-discrimination charge with the EEOC." (Pet. 5) (emphasis deleted). To the contrary, the International maintained consistently and emphatically that the reason it did not respond to petitioner's letter complaining about the Local was that no such letter was ever received. The testimony of the International Vice President quoted in the petition concerned the International's general procedures used in conjunction with its voluntary receipt of EEOC printouts, not its treatment of complaints directly *from members*. (5 RT 180-81.)

[5] In particular, the district court held that the International "discriminated against Stache on the basis of her sex because it knew or should have known of the discrimination against Stache by Local 20 and, despite the power to do so, failed to act." (Pet. App. C-17, 21.) The district court's conclusion that international unions have an *automatic* affirmative duty under Title VII to prevent violations of that statute by their affiliated locals has no support in circuit court case law and is contrary to the court of appeals decisions directly addressing the question. *E.g., Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1427-30 (D.C. Cir. 1988), *cert. denied*, 104 L.Ed.2d 1018 (1989);

2. None of the factual matters pertaining to the International's alleged failure to remedy the discriminatory actions by Local 20 were stated or suggested in any of the four discrimination charges that preceded the lawsuit, or during the extensive EEOC conciliation proceedings that were conducted in response to those charges. Because the petition misstates the facts regarding the filing and processing of the EEOC charges, we review them below.

(a) Petitioner filed the first of the EEOC charges on April 17, 1981. (4 RT 180.) The charge was prepared by an EEOC official who met personally with petitioner (4 RT 180-81), and included a two-page single-spaced explanation of how the Local had discriminated against petitioner in referrals, wages, denial of a union card and apprenticeship training. The charge named only Local 20 as a respondent, and contained no factual information suggesting that the International was involved in acts giving rise to the EEOC claim.[6]

After the charge was served on the Local, an EEOC Equal Opportunity Specialist held a fact-finding and conciliation conference pursuant to 42 U.S.C. § 2000e-5(b), attended by the petitioner and the Local's business manager. At the conference the EEOC official thoroughly reviewed the charge with the Local's business manager,

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Sinyard v. Foote & Davies Div. of McCall Corp., 577 F.2d 943, 944, 947 (5th Cir. 1978). Because the court of appeals in this case concluded that the International was not properly named in the EEOC charges, that court did not reach the issue of whether the district court's decision was correct on the merits of the affirmative duty question. (Pet. App. A-8 at n.1.)

[6] It is undisputed that at the time the first charge was filed against the Local, the International has *no* notice of any kind concerning possible discrimination by the Local against the petitioner. It is hard to see how information first acquired after a charge was filed could be the linchpin of a finding that the International, *before* the charge was filed, had discriminated against the petitioner.

obtained additional information and explained in detail Local 20's Title VII responsibilities. After the conference, the EEOC official held follow-up telephone conversations with both parties that resulted in Local 20's taking various corrective measures. (4 RT 41-46.) The International was not invited to, and did not in fact, participate in any of these proceedings.

(b) In the summer of 1983 petitioner filed a second EEOC charge alleging continuing discrimination. Although petitioner had by this time consulted with an attorney[7] and was admittedly aware of the International's existence and of the facts that later gave rise to the claim that the International had not responded to a request for assistance,[8] petitioner named only Local 20 as a respondent. Moreover, the charge contained no factual allegations from which it could be inferred that the International had been asked to remedy discriminatory conduct, or that the International had failed to do so, because of petitioner's sex or otherwise.

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[7] Although one of the district court's findings (which were copied almost verbatim from those submitted by petitioner) states that "Stache was not represented by an attorney at any time before March 1984 (when she filed the action below)," petitioner's own pre-trial correspondence with the EEOC and trial testimony shows that petitioner was in fact advised by an attorney during the charge filing process. Trial Exhibit 102 shows that petitioner stated in writing to the EEOC that she had had an attorney call that agency on her behalf regarding her charges in August of 1982. Moreover, petitioner testified at trial that she was again advised by an attorney prior to filing her fourth EEOC charge in 1983 (5 RT 44).

Although the ultimate standard of review is unchanged, the Court has frequently "criticized courts for their verbatim adoption of findings of fact prepared by the prevailing parties," noting "the potential for overreaching and exaggeration on the part of attorneys . . ." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 572 (1985).

[8] The letter that petitioner claimed to have mailed to the International Union was dated July 11, 1982. Trial Exhibit 544.

In December of 1983, the EEOC held another fact-finding conference in response to the second EEOC charge. At the conference, which lasted approximately one hour, a second EEOC official met personally with petitioner and with the Local's business manager and obtained from the Local documents that petitioner claimed the Local had improperly withheld from her. During the conference, petitioner again did not allude to the International at all, and mentioned no facts referring to the way in which petitioner's complaints against the Local were handled, or suggesting that the International had engaged in *any* improper conduct.

(c) On January 4, 1984 plaintiff filed a third discrimination charge, this one with the California Department of Fair Employment and Housing, a cooperating EEOC agency. Although this charge added one of petitioner's employers as a respondent, the charge neither named the International nor set forth any of the facts upon which the International's liability was subsequently based.

(d) After consulting further with an attorney,[9] petitioner returned to the EEOC on February 22, 1984 and filed yet a fourth charge, naming the JAC as a respondent. This charge likewise omitted any reference, direct or indirect, to the International.

Thus, the International was unnamed in any of petitioner's four administrative charges, and neither the International nor the EEOC were apprised *in any way* of the allegation that the International had illegally handled complaints against the Local. As a result of this lack of notice, the International had no reason to, and did not, attempt to collect the evidence pertinent to the eventual charges against it, such as evidence pertaining to whether the International Union in fact

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[9] *See* note 7, *supra*.

received petitioner's 1982 letter.[10] In addition, because it was not included in the EEOC conferences, the International had no opportunity, as the Local did, to hear the views of an expert agency as to the governing legal requirements, or to take steps short of litigation to satisfy petitioner's concerns.[11]

In its decision, the Ninth Circuit stated that while EEOC charges are to be construed liberally, a Title VII action may not be brought where "a complainant neither names a defendant in her administrative charges, nor alleges facts implying that the defendant discriminated." (Pet. App. A-8.) That court concluded that "the specific, active acts of discrimination" by Local 20 that were set forth in the petitioner's EEOC charges did not encompass "the International's alleged inaction" in failing to utilize its grievance procedures on petitioner's behalf. (*Id.*) Accordingly, the Ninth Circuit reversed the district court's judgment insofar as it imposed liability on the International.

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[10] The district court's findings of fact and conclusions of law, repeating verbatim the proposed findings submitted by petitioner, recite that the International "suffered no prejudice" from not being named in any of the discrimination charges "because it knew of the first EEOC charge expressly naming its affiliated local before the first fact-finding conference." (App. C-16.) However, the International was ultimately held to be liable not for participating in Local 20's discrimination, but rather on the basis that *the International* violated Title VII by discriminating on the basis of sex in its handling of petitioner's complaints against the Local. Because the International was not informed of petitioner's contention that *the International* (as opposed to Local 20) had discriminated, it did not attempt to gather relevant evidence concerning *its own* activities.

[11] There is no basis whatever in the district court's findings or in the record for petitioner's statement that the International "elected to rely on its local affiliate" to attend the EEOC conference on its behalf. (Pet. 18.)

REASONS FOR DENYING THE WRIT

I. The Decision In This Case Is Consistent With Decisions By Other Circuits In Cases Where An Unnamed Party's Liability Is Based On Facts Different From Those Set Forth In The EEOC Charges.

(a) The petition claims that there are "conflicts among the circuits as to the proper analysis of when Title VII charges may be tried on the merits against parties not named in EEOC charges." (Pet. 13.) That claim rests entirely on petitioner's failure to distinguish between two analytically distinct categories of cases repeatedly recognized by the lower courts in deciding Title VII cases.

The first category involves cases where the "persons not named in the E.E.O.C. complaint . . . were involved in the facts giving rise to the E.E.O.C. claims," *Wrighten v. Metropolitan Hospitals*, 726 F.2d 1346, 1352 (9th Cir. 1984), *i.e.*, where the charges allege particular acts of discrimination but omit the names of some of the parties who engaged in that discriminatory conduct. The second category involves cases in which the liability of one or more defendants sued in the Title VII lawsuit who were unnamed in the EEOC charges is based on a separate set of facts from those contained in the charges.

Once the distinction between these two categories of cases is taken into account, it becomes clear that petitioner's claim that there is a conflict among the circuits on the primary issue decided in this case has no merit.

The present case fits squarely in the second category of unnamed party cases: the lawsuit against the International Union was based on a separate legal theory and a separate set of facts from those underlying the charges filed against the named entities. In particular, petitioner's claim against the International was based not on discrimination in the apprenticeship program but rather on the International's alleged discriminatory failure to respond to petitioner's complaints against the

Local. See pp. 3-5, *supra*. Under this theory, the International's liability would depend upon such facts as its relationship with the Local and the petitioner, the notice the International had regarding petitioner's complaints against the Local and the actions it took in response to that notice. As the Ninth Circuit pointed out (Pet. App. A-8), none of these facts were encompassed within the affirmative acts of discrimination referred to in the EEOC charges.

The Ninth Circuit's holding that a Title VII suit may not be brought in cases where an unnamed party's liability was based on facts different from those set forth in the EEOC charges, far from conflicting with the decision of any circuit court, is fully consistent with the decisions by other circuits. For example, in *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955 (1982), the plaintiffs sued several international unions that had not been named in EEOC charges for damages based on a discriminatory seniority system imposed under contracts negotiated by their affiliated locals. After citing its earlier decision in *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), one of the principal cases relied on in the petition, the Fifth Circuit stated:

> Applying these precedents and principles favoring liberality to the facts now before us, we must nevertheless conclude that the Internationals were insufficiently implicated in the discrimination alleged in appellants' original charges to have reasonably triggered EEOC investigation of the Internationals. *These charges failed to allege specific conduct which clearly implicated the Internationals.* Quite reasonably the EEOC then omitted the Internationals in its investigative and conciliatory efforts.

Terrell v. United States Pipe & Foundry Co., *supra*, 644 F.2d at 1124 (emphasis added). *See also Jones v. Truck Drivers Local Union No. 299*, 748 F.2d 1083 (6th Cir. 1984) (union that had not been named in EEOC charges

could not be sued under Title VII for failing to remedy discrimination by named employer); *Le Beau v. Libbey-Owens Ford Co.*, 484 F.2d 798, 799 (7th Cir. 1973) (international union unnamed in EEOC charges could not be sued in case alleging that contract provisions negotiated exclusively by local were discriminatory); *cf. Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 906 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982) ("parties sufficiently named *or alluded to in the factual statement* are to be joined.") (emphasis added).

In contrast, all of the decisions by other courts of appeals regarding unnamed parties [12] that the petition claims conflict with the Ninth Circuit's decision in this case involve the first category of cases, where the unnamed party *was* involved in the actions complained of in the EEOC charges. In *Glus v. G.C. Murphy Co.*, 562 F.2d 880 (3d Cir. 1977), the charge was based on a discriminatory collective bargaining agreement, and the International, although not expressly named in the charge, negotiated and signed the agreement. In *Eggleston v. Chicago Journeymen Plumbers'*, *supra*, 657 F.2d at 906, the charge indicated that there was discriminatory exclusion from the apprenticeship program, and the defendant joint apprenticeship committee, while not named in the charge expressly, administered the apprenticeship program. Similarly, the unnamed party cases from other circuits cited in the petition—*Romain v. Kurek*, 836 F.2d 241 (6th Cir. 1987), *Greenwood v. Ross*,

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[12] Petitioner also cites numerous cases that deal with the separate issue raised when a single defendant claims that some of the allegations in the Title VII lawsuit were not encompassed in the EEOC charges against it. *E.g., Sanchez v. Standard Brands*, *supra* (EEOC charges against the defendant specified sex discrimination and subsequent lawsuit stated that discrimination involved both sex and national origin); *Turner v. Orr*, 804 F.2d 1223 (11th Cir. 1986) (suit against single defendant could include discriminatory acts occuring after filing of EEOC charges).

778 F.2d 448 (8th Cir. 1985) and *Romero v. Union Pacific Railroad*, 615 F.2d 1303 (10th Cir. 1980)—all involved instances where the charges named a company, union or other entity as a respondent, and the lawsuit added as defendants the individual officials of that entity who engaged in the conduct complained of in the charges.[13]

(b) Whatever may be the case when a plaintiff seeks to bring a Title VII lawsuit against an unnamed party who was involved in the actions complained of in the EEOC charges, the Ninth Circuit is plainly correct in holding that the International could not be held liable in this case for activity that was not even vaguely alluded to in the EEOC charges against Local 20 and the JAC.[14] As this Court reiterated in *Occidental Life In-*

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[13] Like the other circuits, the Ninth Circuit has held that a party not named in the EEOC charges who *was* involved in the actions complained of in the charges may be subject to suit in a subsequent Title VII action. *Kaplan v. International Alliance of Theatrical and Stage Employees and Motion Picture Operators of United States and Canada*, 525 F.2d 1354 (9th Cir. 1975) (international union, although not named in charge, was the party that negotiated and signed the local's collective bargaining agreement challenged in the charge as discriminatory); *see also Chung v. Pomona Valley Community Hospital*, 667 F.2d 788, 790, 792 (9th Cir. 1982) (the charge complained of certain discriminatory promotions, and the unnamed parties were the ones who negotiated the promotions).

[14] Petitioner's contention that the Ninth Circuit erred in "refusing" to remand the case for consideration of the factors set forth in *Glus v. G.C. Murphy Co.*, *supra*, is incorrect for two reasons.

First, as set forth above, *Glus* and the other cases cited by petitioner concern the situation where the unnamed party was involved in the conduct set forth in the EEOC charges.

In addition, however, petitioner did not request the adoption of the so-called *Glus* test or suggest that a remand to the district court was appropriate until after the case had been argued and decided, raising the matter for the first time in her petition for rehearing in the court of appeals. Petitioner likewise did not request the use of the *Glus* test at any point in the district court, including in her proposed jury instructions. (CT 143; Ct 170.)

surance Co. v. EEOC, 432 U.S. 355, 359-60 (1977), Congress established in Title VII an "integrated, multistep enforcement procedure" in which notification to the parties charged and EEOC conciliation procedures are a central and key component.[15]

This lawsuit against the International Union proceeded upon a different theory and upon different facts from those of which the EEOC was given notice and which that Agency had an opportunity to consider. As a result, the International was denied "fair notice of the allegations against it" as well as the benefits of the conciliation process. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 79 (1984).

The petition for *certiorari* should be denied because the result reached by the Ninth Circuit in this case does not conflict with the decisions of other circuits and is fully consistent with the statutory purposes of the EEOC charge filing requirement. Thus, the petition raises no issue of law warranting review and resolution by the Court.

II. This Case Implicates No Difference Among The Circuits Concerning The "Test" For Determining The Scope Of EEOC Charges.

Quoting out of context general statements regarding the "scope of the EEOC investigation" in the Fifth Circuit's opinion in *Sanchez v. Standard Brands, Inc.*, *supra*, petitioner asserts that the Fifth Circuit's approach to determining the scope of EEOC charges is fundamentally

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[15] Congress amended Title VII in 1972 to add the requirement that notice be given to a charge party within 10 days. The purpose of this amendment was "giving notice to the party charged so that he would have the opportunity to gather and preserve the evidence to sustain himself when formal charges are filed and subsequent enforcement proceedings are instituted." 117 Cong. Rec. 31972 (remarks of Cong. Erlenhorn), quoted in *Occidental Life Insurance Co. v. EEOC*, *supra*, 432 U.S. at 371 n.30.

inconsistent with the Ninth Circuit's analysis of the EEOC charges in this case. In fact, however, there is no difference in the approach followed by the two circuits.

As a matter of inherent logic, inquiry into the words of an EEOC charge are necessary to determine what sort of investigation by the EEOC would be reasonable. Thus, the *Sanchez* court itself stated, "we think the crucial element in a[n EEOC] charge of discrimination is the set of *facts* alleged therein . . ." 431 F.2d at 464 n.6 (emphasis in original). Further, immediately after talking about the EEOC's "reasonably expected investigations," the *Sanchez* court returned to the statement of facts set forth in the charge itself, concluding that:

> [N]othing in the judicial complaint filed by Celia Sanchez is *beyond the scope of her charges filed with the EEOC.* Thus she is entitled to maintain her civil action on the basis of that complaint.

421 F.2d at 467 (emphasis added). Subsequent Fifth Circuit cases have likewise reiterated that the scope of an EEOC investigation is "quite reasonably" tied to the "specific conduct" alleged in the EEOC charges. *E.g., Terrell v. United States Pipe & Foundry Co., supra,* 644 F.2d at 1123-24.

Similarly, Ninth Circuit opinions discussing the appropriate scope of EEOC charges frequently refer to what a reasonable EEOC investigation would encompass. For example, *Brown v. Puget Sound Electrical Apprenticeship & Training Trust,* 732 F.2d 726 (9th Cir. 1984), which petitioner cites as the key Ninth Circuit case that "conflicts in principle with the *Sanchez* test because it focuses on the allegations in the EEOC charge rather than the *investigation* that can reasonably be expected to grow out of those allegations" (Pet. 20, emphasis in original), concludes by citing *Sanchez* and stating:

> " 'It is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be expected to grow out

> of the charge of discrimination.'" *Serpe v. Four-Phase Systems, Inc.*, 718 F.2d 935, 937 (9th Cir. 1983), citing *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970).

732 F.2d at 730. Numerous other Ninth Circuit cases likewise refer to both the charges and the EEOC investigation, citing the *Sanchez* opinion approvingly. *E.g.*, *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1051 (9th Cir. 1987) (administrative investigation is "obviously" based on charge filed with the agency). Thus, both the Fifth and the Ninth Circuits have used the "reasonable investigation" language as a way of explaining *why* one focuses on the stated facts in determining the scope of the EEOC complaint.

Accordingly, the decisions of the Fifth and Ninth Circuits show common ground in recognizing that the scope of an EEOC investigation is not determined in a vacuum but is necessarily circumscribed by the statement of facts set forth in the underlying charge. There is thus presented no conflict in "tests" for ascertaining the scope of EEOC charges warranting review by the Court.[16]

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[16] Relying on *Hamm v. Members of Board of Regents*, 708 F.2d 647, 650 (11th Cir. 1983), petitioner suggests that the issue of whether a defendant has been properly named in EEOC charges is an issue of fact governed by the "clearly erroneous" test of Fed. R. Civ. P. 52(a). But petitioner seriously misstates the ruling in that case. Although the court of appeals did note that the question of whether two defendants were included in the EEOC charges was "not entirely free from doubt," its statement that the trial court's decision was not "clearly erroneous" concerned an entirely different matter, namely its dismissal of the charges against other defendants *on the merits* at the conclusion of plaintiff's case under Fed. R. Civ. P. 41(b). 708 F.2d at 650.

Although underlying factual questions may occasionally be raised, the ultimate determination of whether a defendant in a Title VII lawsuit has been properly named in EEOC charges, like other questions concerning whether a pleading adequately states a claim against a particular party, is necessarily a matter of law. *Compare Schiavone v. Fortune*, 477 U.S. 21, 25-28 (1986). Thus,

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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the "clearly erroneous" test for reviewing district courts' determinations of fact plainly does not govern the resolution of this ultimate legal issue. While some of the circuit courts have stated that the issue of whether parties were properly named should be "initially considered" by the district court, *Eggleston v. Chicago Journeymen Plumbers, supra*, 657 F.2d at 907 n.33; *Romero v. Union Pacific R.R. Co., supra*, 615 F.2d at 1312, no court has indicated that those rulings are then subject to review under the "clearly erroneous" standard.